

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 376 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

VAGHJIBHAI D PATEL

Versus

KANTILAL NARANDAS SHAH

Appearance:

MR PV NANAVATI for Petitioners
MS VASUBEN P SHAH for Respondent No. 1
MS KJ BRAHMBHATT for Respondent No. 2
NOTICE SERVED for Respondent No. 4

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: /11/2000

C.A.V.JUDGEMENT

1. This is landlord's revision under sec.29(2) of the
Bombay Rent Act against the judgment and decree of the
lower Appellate Court, setting aside eviction decree

passed by the trial Court and dismissing the suit of the landlord/revisionist for recovery of possession of the disputed accommodation from the defendants.

2. The brief facts giving rise to this revision are as under :-

Initially, in the year 1947, the defendant no.1 was given open land on lease for carrying on his business. Thereafter, on the request of the defendant no.1, permanent shops were constructed by the plaintiff in the compound and the defendant no.1 was let out one shop on monthly rent of Rs.55=00. Rent note was executed in the year 1954. After one year the rent was reduced to Rs.45=00 per month on the request of the defendant no.1. Suit for eviction of the defendant from the disputed shop was filed on various grounds, namely, tenant was in arrears of rent exceeding six months; that he had sublet or transferred or assigned the suit shop to the defendant nos.2 and 3 illegally; that he created nuisance in the suit shop; that there was breach of terms of tenancy committed by the defendant no.1; that the shop was bonafidely required by the landlord and that the tenant committed waste in the suit property.

3. The suit was resisted by the defendants denying all these allegations. Dispute of standard rent was also raised by them.

4. The trial Court found that the defendant no.1 had illegally sublet the disputed shop to the defendant nos.2 and 3. Thus, they committed breach of terms of tenancy, in as much as, there was prohibition of subletting in the rent note executed by the defendant no.1. Other grounds seeking eviction of the tenant were not found established by the trial Court. Hence, the suit was decreed on grounds of illegal subletting made by the defendant no.1 in favour of defendant nos.2 and 3.

5. Feeling aggrieved, the defendants preferred appeal, which was allowed. The appellate Court found that there was no illegal subletting, nor it was a case of transfer or assignment of interest in the tenancy by the defendant no.1 to the defendant nos.2 and 3. It further found that there was no breach of terms of tenancy, which was committed by the defendant no.1. Accordingly, the suit for eviction was dismissed by the lower Appellate Court. Hence, this revision.

6. Cross objection was also filed by the landlord, which was dismissed by the lower Appellate Court.

7. Shri PV Nanavati, learned counsel for the revisionist, while opening the argument stated that the findings of the lower Appellate Court on point nos.2 to 6 are concluded findings, hence, these points do not survive for decision in this revision. He further contended that the findings of the lower Appellate Court on the point of subletting are illegal, hence, the revision deserves to be allowed.

8. Shri PV Nanavati, learned counsel for the revisionist and Ms.Kalpna Brahmbhatt, learned counsel for the respondent were heard and the judgments of the two courts below were examined. The only point argued by Shri Nanavati was that the finding of the lower Appellate Court on the plea of subletting is illegal, whereas the finding on this point recorded by the trial Court is correct and in accordance with law. He has taken me in detail through the two judgments, namely, of the trial Court as well as of the appellate Court and argued that the view taken by the lower Appellate Court that the partnership deed is genuine, is not borne out from the recital made in the partnership deed itself and that it was nothing but a sham transaction. Hence, the plea of subletting is established. The trial Court, on the other hand, found that the partnership deed is a sham transaction. Shri Nanavati has vehemently argued that the finding of the lower Appellate Court is erroneous. However, the finding on the question, whether the partnership deed is a genuine transaction or a sham transaction, is a finding of fact which has been returned by the lower Appellate Court, looking to the conditions in the partnership deed and also basing upon the evidence on record. The intention of the defendants was also considered by the lower Appellate Court. Consequently, such finding of fact will require inference in this revision only when it is found contrary to law, illegal or perverse. As pointed out above, it can not be said that the clauses of partnership deed have been illegally interpreted by the lower Appellate Court. Further, it has to be seen, whether the intention of the defendants in entering in partnership was to create a genuine partnership firm or to create a fake partnership firm only for defeating future claim of the landlord for eviction of the tenant-in-chief and his partners. It is well settled law that a tenant has right to carry on business either for himself personally or with the help of his agents or servants. It is also well settled law that a tenant can enter into partnership with others for carrying on business more profitably. That right of the tenant can not be taken away. It can be said to be

doubtful transaction only when the partnership deed on the face of it is found to be a sham transaction. Exhibit 161 is the deed of partnership. There is recital in the partnership deed that these three persons were carrying on business in partnership since 8-11-1975. Partnership deed was executed thereafter in the year 1976. In first clause of the partnership deed, retrospective operation of the partnership business has been given by mentioning, that the partnership business shall be deemed to have been commenced w.e.f. 8-11-1975. The place of business was shown to be the disputed premises. The share of first party, namely the tenant-in-chief in the profit and loss was 5 paise, that of the second party 45 paise and that of the third party 50 paise. All the parties were required to make investment in the capital. Nature of partnership firm was at will. If any partner wanted to retire, he was required to give one month's notice in writing, in advance. If any partner retired within a period of 5 years from the commencement of business, he will have no right in the goodwill of the firm. Clause-9 provides that, in the event of retirement of any of the partners, the remaining partners shall be entitled to continue the business of the aforesaid firm in the aforesaid name and at the aforesaid place. This clause of partnership deed was vehemently criticized by Shri Nanavati, who pointed out that this is a clause which reflects that the partnership deed is a sham transaction. According to him, it is not clarified in clause-9 as to what will happen if the defendant no.1, namely the tenant-in-chief retires. According to Shri Nanavati, in case if the tenant-in-chief retires, the premises shall revert back to him and that the other partners will not be entitled to carry on business there. However, this omission alone is not sufficient to infer that the partnership deed was a fake transaction. Relationship between the partners has also to be taken into consideration. Defendant no.1 is the maternal uncle of defendant nos.2 and 3. Upon the demise of the father of defendant nos.2 and 3, they were brought up by the defendant no.1 and he also provided education to these persons. In this set of circumstances, it can not be said that the defendant no.1 entered into fake transaction with outsiders. If his intention was not malafide, he could have provided some accommodation in the partnership business to establish his nephews.

9. It may also be mentioned that so far no partner has retired. As such, it can not be said that during this period of 25 years, the intention of the defendant no.1 was to setup a sham partnership deed. Simply because the

share in profit and loss of the defendant no.1 is disclosed in the deed of partnership to be 5 paise, whereas the share of defendant nos.2 and 3 in profit and loss is shown as 45 and 50 paise respectively, it can not be said that the defendant no.1 was a sleeping partner. It is not the case where the defendant no.1 has retired from the partnership business and the business is still being carried on in the demised premises by the defendant nos.2 and 3. If there has been no retirement of any partner and all of them are carrying on business in the demised premises, it can not be inferred that the partnership deed is a fake transaction.

10. From clause-13 of the partnership deed also no inference can be drawn that this deed is a fake or sham transaction. Shri Nanavati has placed reliance upon clause-13 of the partnership deed, which provides that the business of the firm shall not be deemed to have been closed on account of retirement from the firm, but the remaining partners shall be entitled to continue the partnership firm. Clauses-9 and 13 of the partnership deed, in these circumstances, can not be said to be conflicting in nature, nor from these clauses it can be said that the partnership deed is a fake transaction.

11. Shri Nanavati further argued that from clause-14 of the partnership deed, it appears that the second party was the main person who was to attend the partnership work relating to Government, Income-tax, Sales-tax, Municipality, Drug Control Department, etc: The work of maintaining accounts of the firm was also to be looked after by the second party. From this clause, again it is difficult to draw inference that the first party was a sleeping partner. The partners may agree for distribution of work, and if major portion of work or responsible nature of work was entrusted to second party, it can not be said that the partnership was fake transaction.

12. Thus, from the partnership deed, it can not be said that it was prima facie a fake transaction.

13. Shri Nanavati next contended that the defendant nos.2 and 3 are carrying on their business in the name of Azad Hat in the suit premises, whereas the defendant no.1 had started a separate business of Bela Hair Dye in the name of Aphilion Corporation, which also indicates that the defendant no.1 has no interest either in the partnership business or in the tenanted accommodation. From the evidence on record, it can not be held that the defendant no.1 has lost control or possession over the

partnership business or has parted with the possession of the tenanted accommodation exclusively to the defendant nos.2 and 3.

14. It would be relevant to mention that subletting as a ground for eviction was not taken initially in the plaint. It was subsequently introduced by way of amendment in the plaint. Even then, the plaintiff did not state on oath that the partnership business was sham or bogus or a camouflage to subletting. There is evidence on record that the account was opened in the name of Azad Hat in Bank of Baroda and this account was to be operated by any of the three partners on behalf of the firm. This also shows that the defendant no.1 had not severed his connection either with the partnership business or with the accounts of the firm. There is also evidence that licence from Drug Control Department was obtained originally by the defendant no.1 and thereafter it was issued in the name of the partnership firm. Another account was opened by the firm in Ahmedabad Mercantile Cooperative Bank in the name of Azad Hat by the defendant no.1, which was operated and could be operated by any of the three partners. There is also evidence that the defendant no.1 used to attend the business in the suit premises and was coming to the suit premises off and on. This is clear from the cross-examination of the plaintiff's witness Jaysukh Daftana. It was not necessary for the defendant no.1 to come regularly to the premises in suit for looking after the business especially, when he was running his separate business in addition to the business of partnership. It is also in evidence that the defendant no.1 agreed for obtaining loan from the bank for the partnership business, which shows that the defendant no.1 was actively participating in the business run in the suit premises.

15. There is mention in clause-3 of the partnership deed that the rent for the said place of business shall be paid by the firm. This was nothing unusual clause in the partnership deed. Further it has come in evidence that the rent was paid by the defendant no.1 and not from the accounts of the firm. This also shows that the defendant no.1 had not lost his interest in the tenancy rights in the demised premises. It is again difficult to appreciate the contention that, in the partnership deed tenancy rights and goodwill were not retained by the defendant no.1. The contention of Shri Nanavati that the partnership deed is a fake transaction could be appreciated if the defendant no.1 would have retired from partnership business and permitted the defendant nos.2 and 3 to carry on business in the suit premises. In that

case, it could have easily been held that it was a case of transfer of interest in tenancy rights in the suit premises and partnership deed was a fake transaction. But, on the facts of the case, since the partnership business is still being carried on by all the three partners and no partner has retired, hence the question of illegal subletting or transfer of possession or assignment of rights in tenancy does not arise.

16. Shri Nanavati has referred two cases of D.K. Patel v/s. Sulochanaben 1994(1) GLR 541 and K.G. Parmar v/s. B.M. Dodia 1999(2) GLR 1446. I have gone through these cases. They are distinguishable on facts, hence they do not apply to the facts of the case under consideration.

17. In the result, I am of the view that the partnership deed was not interpreted by the lower Appellate Court on extraneous consideration, nor it can be said that the intention of the defendants in creating the partnership was not correctly determined by the lower Appellate Court. If the partnership was not a fake transaction and the partnership business is still being run by the three defendants in the suit accommodation, the plea of alleged sub-tenancy which was an after-thought, can not be accepted nor it can be held that the defendant no.1 has transferred or assigned in any other manner his interest in the tenancy rights in favour of defendant nos.2 and 3. The lower Appellate Court in these circumstances was justified in reversing the judgment and decree of the trial Court. I do not find any illegality, infirmity or perversity in the judgment of the lower Appellate Court. Consequently, the revision is without merit and is bound to be dismissed. The revision is hereby dismissed with no order as to costs.

Dated : [D.C. Srivastava, J.]
/sakkaf